IN THE

Supreme Court of the United States

October Term, 1939

No. 1009.

77

LUMBERMEN'S MUTUAL CASUALTY COMPANY,
a corporation,

Petitioner,

vs.

MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN,
a minor, and LORAINE JOHNSON,

Respondents.

RESPONDENTS' OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Charles Evans Hughs, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Mrs. Leotia E. McIver, Jeff Clark, Grace Vaughn, a minor, and Loraine Johnson, respondents in the above matter, herewith present their brief in opposition to the petition of Lumbermen's Mutual Casualty Company, a corporation, for Writ of Certiorari.

It is evident from the petitioner's brief that it relies solely and entirely upon the case of *State Farm Mutual Automobile Ins. Co. v. Coughran* (1938), 303 U. S. 485, 82 L. Ed. 970, which case supported the finding of the

United States Circuit Court of Appeals that the car in the *State Farm* case was operated jointly by the minor and the adult. In the present case under consideration, the United States District Court and the United States Circuit Court of Appeals have held and found that the car in question was not operated by the minor, Grace Vaughn, but was operated solely by the adult, Jeff Clark. This finding, which is set forth at length in No. 5 of the Findings of Fact and also in No. 10 of the Findings of Fact of the United States District Court, is amply supported by the evidence introduced at the trial of the action, which evidence was in no respect or degree contradicted by the petitioner in this case.

The State Farm Mutual Automobile Ins. Co. v. Coughran Case, Supra, Has Been Fully Considered and Distinguished.

Petitioner in this matter would make it appear to this Court that the United States District Court and the United States Circuit Court of Appeals ingeniously and studiously attempted to overrule the Supreme Court of the United States in the case of *State Farm Mutual Automobile Ins. Co. v. Coughran, supra.* (Petitioner's Brief, p. 22, par. 4; pp. 25, 27, 29.) Quoting from page 30 of petitioner's brief:

> "Obviously the trial judge did not like the doctrine of *State Farm Mutual Automobile Ins. Co. v. Coughran* and proceeded to interpret the evidence so as to justify findings which in his view would thwart the clear rulings of this Court."

This statement by petitioner in a brief before the Supreme Court of the United States is extraordinary and is plainly the statement of a disappointed mind and a loser,

and is nowhere substantiated by anything in the record of this case. An examination of the Transcript of Record before Your Honorable Court in this case will disclose that full and careful consideration was given to the *State Farm* case by the United States District Court, as well as by the United States Circuit Court of Appeals, and the petitioner herein in both Courts fully set forth said case for consideration. [Tr. pp. 58, 59, 145, 167, 168.] The decision of the United States Circuit Court of Appeals was a unanimous decision in the present case. In the case at bar, the United States Circuit Court of Appeals for the Ninth District said [Tr. p. 168]:

> "In passing we may add that although appellant stated that he is arguing the absence of substantial evidence to support such finding, his argument in fact is that the better judgment would have been that Clark's testimony should not have been believed and that from all of the circumstances the trial court should have found that either Grace alone or she and Clark jointly were operating the car."

The Evidence in This Case Was Given Full and Careful Consideration by the United States Circuit Court of Appeals.

Petitioner would also make it appear that the United States Circuit Court of Appeals did not consider or review the evidence introduced before the trial judge in this case. (Petitioner's Brief, pp. 10, 29, 30.) The United States Circuit Court of Appeals had before it all of the evidence presented before the trial court. It considered the evidence introduced before the trial court and it did not affirm the decision of the United States District Court, as the petitioner would make it appear, simply on the ground that it could not upset a finding of fact of the United States

District Court. The United States Circuit Court of Appeals refers at length to the evidence in its opinion. [Tr. pp. 161 to 169, incl.] We quote from the opinion of the United States Circuit Court of Appeals [Tr. p. 169]:

> "In the circumstances, *and since the evidence is not so clearly to the effect that the automobile was under joint control at the time of the accident* that we should ourselves inject the issue in the interest of justice, we hold that the issue is not before us." (Italics ours.)

Quoting further from said opinion [Tr. p. 167]:

> "Clark's testimony was sought to be impeached by certain written statements made theretofore by him, but they do not in our opinion justify our rejecting the credit given Clark's evidence by the trial court nor the finding based thereon."

Here is what the trial court said in its written Memorandum of Opinion with reference to these statements [Tr. pp. 57 and 58]:

> "Effort was made by counsel for the insurance company to impeach the testimony of Mr. Clark by introducing in evidence two written statements, admittedly signed by Clark at the instigation of a representative of the insurance company—six and ten days, respectively, after the accident. Mr. Clark testified substantially as follows: These statements were written out by the insurance company's representative and he, Clark, signed them without reading them over carefully. He understood that they were simply informal reports of the accident and felt at the time that he should 'play ball' with the insurance company as he was in the real estate and insurance business

himself. For these reasons he was not careful to correct the written statements when they were submitted to him. These written statements contained assertions of fact which were disproved at the trial. Some, at least, of these misstatements were so at variance with the proven facts and the probabilities as to indicate to the court that they were inspired by an over-zealous insurance company representative. In any event the written statement that Gracie was driving the car at the time of the accident was repudiated by Clark. The court feels that the testimony of Clark at the trial revealed the true facts and that the written statements were inaccurate, and in some respects untrue."

Finding of Fact No. 10 Is Not a Conclusion of Law and Is Not Inconsistent With Finding of Fact No. 5.

An examination of Findings of Fact No. 5 and No. 10 [Tr. pp. 63 to 67, incl.] will clearly show that Finding of Fact No. 5 standing alone would sustain the decision of the United States District Court in this case because it definitely finds that Jeff Clark was solely operating and driving the automobile in question. Petitioner admits that Finding of Fact No. 5 is true. (Petitioner's Brief, p. 31.) We quote in part from Finding of Fact No. 5 (Petitioner's Brief, pp. 4 and 5):

> "that when the automobile described in said policy was within approximately forty feet to the east of said stopped westbound automobiles, Jeff Clark seized the steering wheel with both hands and swerved the automobile described in said policy to the left and over to the south side of said Fourteenth street and past said stopped automobiles; that while on the

south side of said Fourteenth street at its intersection with said Montana street, the automobile described in the policy struck Loraine Johnson; that at the time of the impact the car was proceeding at a speed of approximately twenty-five miles per hour, having picked up speed because of the incline down which it was proceeding; that after said impact the automobile described in the policy was steered by Jeff Clark across the intersection and back to the north side of said Fourteenth street where he brought it to a stop; *that prior to the impact* and while Jeff Clark was steering the automobile described in said policy, he reached, with his left hand, across Grace Vaughn's lap for the emergency brake lever of the automobile described in said policy and applied the said emergency brake lever; * * * that after Clark seized the steering wheel Grace Vaughn did not attempt to steer the car or to operate the clutch or brake pedal;" (Italics ours.)

Finding No. 10 is a finding that the car was operated by Jeff Clark alone, and it was not operated by said Grace Vaughn. With reference to Finding of Fact No. 10, and the use of the word "operated," petitioner has overlooked the very important point that it originally instituted the present action in the United States District Court for declaratory relief and for a construction of the exclusion clause in the insurance policy in the light of the facts surrounding the accident. The exclusion clause in the policy in this case reads as follows (Petitioner's Brief, p. 2):

EXCLUSIONS.

"This policy does not apply: * * *

"(c) Under any of the above coverages while the automobile is *operated* by any person under the age

of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person. * * *"

The policy itself uses the word "operated" and not the word, driving. The United States District Court in its opinion and its findings of fact and conclusions of law [Tr. pp. 48 to 70, incl.], does not try to sustain its decision by distinguishing between the words, "driving" and "operating." This is evident from Finding of Fact No. 5, and the use of the word "operated" in Finding of Fact No. 10 is in line with the exact wording of the policy itself. Under the law of the State of California in effect at the time of the accident in question, there is no distinction between the word "operator" and "driver." (Vehicle Code of the State of California, Section 69):

" 'Driver' is a person who drives or is in actual physical control of a vehicle."

Section 70:

" 'Operator' is a person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle upon a highway."

The United States District Court in finding, as it did, as a fact the matter set forth in Finding of Fact No. 10, also followed the original complaint of petitioner herein filed in the District Court of the United States and based its finding on the allegations of petitioner herein set forth in paragraph XI of the complaint [Tr. p. 7]:

"* * * that the automobile *at the time of the accident* was being *operated* by a person in violation of the Vehicle Code of the State of California as to age applicable to said Grace Vaughn." (Italics ours.)

Also, in paragraph VI of the petitioner's complaint [Tr. p. 5]:

> "* * * that *at the time of said accident* the automobile described in said policy of insurance was being driven and operated by the defendant Grace Vaughn, a minor; * * *." (Italics ours.)

It is clear, then, that Finding of Fact No. 10 is not a conclusion of law, but is a finding contrary to the allegations of the petitioner in its complaint. The United States District Court found that Jeff Clark operated the automobile and that Grace Vaughn at the time of said accident was not operating said automobile. Therefore, the issues of fact presented at the trial of the cause could not be set forth any clearer as a finding of fact on these issues.

Petitioner, probably because of desperation, quotes from and cites the case of *Brown v. Travelers Insurance Co.* (Petitioner's Brief, p. 21.) The facts in this case have no application whatever to the case now under consideration. The law of *Brown v. Travelers Insurance Co.* is unquestioned and was accepted by the United States District Court in the present case. In *Brown v. Travelers Insurance Co.* the evidence was undisputed that the minor was operating the automobile and the only question raised on the appeal was whether or not the exclusionary clause applied in a case where the minor could have obtained a license if he had applied for one.

Findings Will Not Be Upset on Appeal.

"All reasonable inferences are to be indulged in support of the findings and the burden is upon appellant who claims error to show its existence."

Purham v. First Natl. Bank of LaVerne, 87 Cal. App. 224;

Miller v. First Savings Bank, 90 Cal. App. 387.

Vol. 2, 1938 Supplement, New Calif. Digest, McKinney's, page 143:

"In the absence of a showing to the contrary, it must be assumed that a judgment which has become final was supported by the findings.

Harris v. Hensley, 214 Cal. 420, 6 Pac. (2d) 253.

"Every intendment must be indulged to support a findings."

Estate of Putnam, 219 Cal. 608, 28 Pac. (2d) 27 (reviewed in 22 Cal. Law Review, 450).

"The mere fact that the trial court found against a special defense was not sufficient to justify the appellate court in interfering with the judgment on appeal on the judgment-roll alone, the presumption being in favor of the findings and judgment in the absence of the evidence."

Nunziato v. Prout, 104 Cal. App. 573, 286 Pac. 455, 287 Pac. 366.

Vol. 2, 1938 Supplement, New Calif. Digest, McKinney's, page 144:

"It is the appellate court's duty to indulge all reasonable inferences to support the findings and judgment."

Volat v. Tucker, 9 Cal. App. (2d) 295, 49 Pac. (2d) 337.

"In absence of a showing by the findings that the evidentiary facts were the only facts proved or that the court found the ultimate fact from the probative facts alone, mere circumstance that some of the probative facts do not support the ultimate fact will not permit the appellate court to disregard the ultimate fact if there is substantial evidence to support it."

Volat v. Tucker, 9 Cal. App. (2d) 295, 49 Pac. (2d) 337.

"Although certain probative facts did not appear to support the ultimate fact that there was no wilful misconduct, where there was no indication that there were not other facts to support the ultimate fact, and there was other evidence to support the ultimate fact, the findings were conclusive on appeal."

Volat v. Tucker, 9 Cal. App. (2d) 295, 49 Pac. (2d) 337.

"In an action tried before the court, findings of fact are conclusive on the Appellate Court though it might have reached a different conclusion on the evidence."

National Surety Co. v. Globe Grain and Milling Co., 256 Fed. 601, 167 C. C. A. 631. (This is a decision of the United States Circuit Court of Appeals of California.)

The Question of Joint Operation Was Not in Issue at the Trial, Petitioner Claiming That Grace Vaughn Was the Operator, and Respondents Herein Alleging and Proving That Jeff Clark Was the Operator Solely.

Petitioner raised the question of joint operation for the first time on its appeal to the United States Circuit Court of Appeals. The appellant's complaint in the United States District Court alleged that Grace Vaughn alone was operating the automobile at the time of the accident, and the burden of proving this was upon the appellant. The trial court found as true that Jeff Clark was operating the automobile at the time of the accident and that Gracie Vaughn was not operating the automobile at the time of the accident. Appellant did not introduce any evidence at the time of the trial to show any joint operation. In commenting on this, Judge Jenney says in his Memorandum Opinion [Tr. p. 52]:

> "It is well established both on principle and authority that when the existence of the policy at the time of the loss has been admitted and compliance therewith has been alleged, the burden of proving affirmative matter constituting a special defense rests upon the insurance carrier. Aetna Ins. Co. v. Kennedy, 301 U. S. at 395; Hartford Fire Ins. Co. v. Morris (C. C. A. 6), 27 Fed. (2d) 508; Murdie v. Maryland Casualty Co. (D. C. Nev.), 52 F. (2) 888, appeal dismissed, 57 F. (2d) 1081; Kimball Ice Co. v. Hartford Fire Ins. Co. (C. C. A. 4), 18 F. (2) 563. The burden of proving the special defense in the case at bar accordingly rests on the Lumbermen's Mutual Casualty Company.
>
> "This conclusion is re-enforced by an examination of the pleadings. It is to be noted that the insurer's

allegation consists, not of a statement that Jeff Clark *was not* operating the automobile, but of an affirmative assertion that Gracie Vaughn *was* driving it. The burden of proving that fact rests on the one asserting it.

"The Vehicle Code of California provides as follows:

"'"Driver" is a person who drives or is in actual physical control of a vehicle.' Section 69.

"'"Operator" is a person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle upon a highway.' Section 70.

"The one question of fact before the court therefore is: Was Gracie Vaughn driving or in actual physical control of the motor vehicle at the time of the impact?"

An Operator or Driver of an Automobile Is One and the Same, Being a Person Who Drives or Is in Actual Physical Control of a Vehicle.

Section 6970, *California Vehicle Code, supra.*

The evidence is conclusive that Jeff Clark alone was the driver and also was in actual physical control of the vehicle at the time of the accident. Under the law above cited, if he were only in actual physical control of the vehicle at the time of the accident, he would still be the driver or the operator because the definitions are in the disjunctive.

What is meant by driving or operating an automobile and what are the acts necessary to drive or operate an automobile?

1. The car must be given gasoline.
2. The car must be in gear or may be in neutral.
3. The operator must steer the vehicle.
4. The operator must apply the brakes to the vehicle.

A combination of these things results in the operation and driving of an automobile. What was Jeff Clark doing of these things at the time of the accident? Answer: He was steering the automobile for approximately thirty-two feet before the impact, and was endeavoring and successfully endeavored to avoid hitting parked cars; he knew what he was doing and succeeded in doing it. He tried to stop the car with the emergency brake when he saw that Mrs. Johnson was in front of him in the pedestrian zone. The car was already moving so there was nothing further for him to do to make the car move and there was no testimony that Grace Vaughn was applying or giving the motor any gasoline at the time and after Jeff Clark took hold of the steering wheel, and her testimony is that she does not recall doing anything in connection with the operation of the car after Jeff Clark took hold of the steering wheel and she corroborated his testimony about reaching across her for the emergency brake before the impact. Certainly no one can say, in view of these facts, that Grace Vaughn at the time of the accident was doing anything towards the operation or driving of the vehicle in question. The testimony shows that the foot-brake was not working and it certainly would be no advantage to step on the clutch pedal because this would accelerate the speed of the car by disconnecting the clutch from the gears which connect with the motor, and the car would

then lose the benefit of the power of compression which tends to hold back an automobile.

The distinction and distinguishing features between the *State Farm Mutual Automobile Ins. Co. v. Coughran* case, *supra,* are clearly and logically set forth in the United States District Court's Memorandum Opinion [Tr. pp. 58 and 59]:

> "Counsel for the insurer insists that this case is controlled by the decision in State Farm Mutual Auto Ins. Co. v. Coughran, 303 U. S. 485, because Gracie Vaughn and Jeff Clark were jointly operating the vehicle. An examination of that opinion discloses an express finding of joint operation. The evidence there showed that a minor in the driver's seat was actually employing all of the operating devices except the steering wheel which had been seized by the insured's wife. No such finding can be made on the evidence in this case. There is no convincing evidence that Gracie Vaughn activated any of the operating devices of the vehicle. The fact that there may have been available to Clark certain devices which he did not use, or that he did not do certain things which he might have done, is not material here. His failure to blow the horn to warn pedestrians, or to use the clutch or foot-brake—assuming that the latter was functioning—may or may not have amounted to negligence, but such failure of Clark cannot prove that Gracie Vaughn was the operator of the car. Her mere presence in the front seat behind the driving wheel is not determinative. The holding of a small child in the lap of a driver—alone, could not be held to be proof of joint operation; and Gracie's presence in the driver's seat was no more efficacious for driving purposes than the child in the lap."

The Petitioner Has Presented No Ground for the Issuance of a Writ of Certiorari Which Could Be Based Upon and Supported by the Evidence, Decision, and Law in the Present Case.

The facts in this case and the decision of the United States District Court and the United States Circuit Court of Appeals are not in conflict with the decision of another Circuit Court of Appeals on the same matter, and the decision does not decide an important question of local law in a way probably in conflict with applicable local decisions.

A review on Writ of Certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor.

All of the above is found in the Revised Rules of the Supreme Court of the United States, page 32.

The Case at Bar Does Not Present Any Matter That Is of Vital Public Concern.

Petitioner tries to impress this Court with the idea that matters of vital public concern are involved in this litigation. (Petitioner's Brief, p. 32.) Petitioner knows that there are insurance companies who write public liability policies without the exclusionary clause contained in said policies as is contained in the present policy under consideration. Petitioner would have the Court believe that its exclusionary clause in the present policy was put in there as a matter of public safety and public policy. I think we can assume that the exclusionary clause is a matter of contract between the insurance company and the insured, and the policies are written from year to year and may be canceled at any time by the insurance com-

pany during the year and new provisions in the policy can be added at any time after cancellation or expiration by the writing of a new policy, and the exclusionary clause is strictly for the benefit of the insurance company itself and the burden of proving facts within the exclusionary clause is solely upon the insurance company, the petitioner in this case.

Respondents' Affirmative Argument in Support of the Decision and in Opposition to the Petition for Writ of Certiorari.

In the case of *State Farm, supra,* the Supreme Court said that in support of the respondent's position, said respondent relied heavily upon the case of *O'Connell v. New Jersey Fidelity and Plate Glass Ins. Co.,* 201 App. Div. 117, 193 N. Y. Sup. 911, 23 A. L. R. 1473, and *Williams v. Nelson, infra.* The Supreme Court said:

> "These causes, we think, are not in point. They were decided upon facts and circumstances materially different from those here disclosed."

In the *O'Connell v. New Jersey, etc.,* case, *supra:*

> "It was held that a violation of the provision of the highway law, forbidding minors below a certain age to operate an automobile, would constitute no defense to an action on an automobile liability policy issued to the owner of the car, and a recovery was held justified where there was evidence that the insured had been teaching his fourteen-year-old granddaughter to operate his automobile; that, as she approached an opening which workmen had made in a bridge, she turned the car to the left to avoid the

opening; that as she did so, and when the car was 20 feet from the opening the insured grabbed the wheel, turned to the right, and applied the emergency brake; that the car did not stop, but struck plaintiff's intestate. The court stated that it appeared beyond cavil that 20 feet before any accident occurred the owner of the car was operating it, and that the girl did not exercise any control over it for that distance, and that accordingly the insurer was not relieved from liability by reason of an exception in the policy that it did not cover loss on account of injuries caused by an automobile driven by, or in charge of, any person in violation of law as to age, or, in any event, under the age of sixteen years."

The decision in the *O'Connell* case is sound and the facts are almost identical with the facts in the instant case.

In the case of *Williams v. Nelson* (1917), 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538, 6 A. L. R., page 379:

"Where the policy provided that it did not cover loss from liability for, or any suit based on injuries caused by, any automobile while driven or manipulated by any person under the age fixed by law, or under the age of sixteen years in any event, a finding was held supported by the evidence that prior to an accident a son of the insured under sixteen years had been driving the insured's automobile, which caused an injury, but that shortly before the machine struck the person injured the insured suddenly leaned over and took the wheel from his son, and that, although he was not in a position to readily prevent the accident by manipulating the pedals, or levers for stop-

ping the machine, yet he was driving, and that his was the dominating mind in control of the car, and it was therefore held that a recovery might be had under the policy."

The *Williams v. Nelson* case is sound law, and the facts are almost identical with the facts in the present case under consideration.

Conclusion.

In conclusion, respondents respectfully urge this Court to deny the petition for Writ of Certiorari to the United States Circuit Court of Appeals in this action.

Dated: June 11, 1940.

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